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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 19[illegible]47

No. [illegible]

THE UNITED STATES OF AMERICA, PETITIONER

vs.

MICHAEL DI RE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 2, 1947
CERTIORARI GRANTED MAY 26, 1947

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 1193

THE UNITED STATES OF AMERICA, PETITIONER

vs.

MICHAEL DI RE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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In the United States Circuit Court of Appeals for the Second Circuit

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

vs.

MICHAEL DIRE, DEFENDANT-APPELLANT

Statement under rule XIII

The indictment herein was filed in the United States District Court for the Western District of New York on May 2, 1944, against Michael DiRe, charging him with possession of a quantity of counterfeit gasoline rationing coupons, in violation of Section 1394.8178 of Ration Order No. 5C, issued by the Office of Price Administration, in violation of Sec. 301 the Second War Powers Act of 1942 and the Amendments, Regulations, Orders, and Schedules promulgated pursuant to such Act.

The defendant was arraigned on July 3, 1944, and pleaded not guilty.

The case was tried before the Hon. John Knight, United States District Judge for the Western District of New York, and a jury, in Jamestown, N. Y., on August 8, 1944. On that date the jury found the defendant guilty as charged in the indictment.

On August 8, 1944, the defendant's motion to set aside the
2 verdict was denied. On August 14, 1944, further motions to set aside the verdict and in arrest of judgment were denied.

On August 14, 1944, the defendant was sentenced to one year in an institution to be designated, and to pay a fine of One ($1.00) Dollar, payment of fine suspended.

On August 14, 1944, notice of appeal was filed, and the defendant was released on bail pending argument and decision of this appeal.

In United States District Court, Western District of New York

Crim. 3746–C.

UNITED STATES OF AMERICA

vs.

MICHAEL J. DIRE, ALIAS MIKE J. DIRE

Docket entries

Possession of counterfeited gasoline ration coupons, in violation of Section 301 of the 2nd War Powers Act of 1942.
Offense: April 14, 1944—1 count $5.00.
6–23–44—Filed indictment.
6–23–44—Initial docket report made up.

6- 2-44—Filed Comm. Trans.
6- 3-44—Filed Bond.
7- 3-44—Defendant duly arraigned in open court entered a plea of not guilty.
7-22-44—Filed subpoena with Marshal's return of service on Reid, Manning, Neff, O'Brien.
3 8-2-44—Filed praecipe for subpoena on Harold N. Reid. Issued subpoena.
8- 4-44—Filed subpoena on Harold N. Reid with return of service.
7-26-44—Filed subpoena with Marshal's return of service on O'Donnell, Gross & Collins.
8- 8-44—Case moved for trial. Trial before judge and jury. Motions to dismiss denied. Jury returns verdict of guilty as charged. Motion to set aside verdict denied. Sent. deferred to Aug. 14, 1944 at Bflo.
8-14-44—Filed notice of appeal and appeal bond 5.00
Motion to set aside verdict denied. Defendant appears for sentence whereupon he is sentenced to be confined for one (1) year in an institution to be designated and to pay a fine of $1.00, payment of fine suspended—Knight, D. J.
8-14-44—Judgment entered and filed.
8-14-44—Commitment issued.
8-14-44—Final docket report made up.

CLOSED

8-17-44—Filed order ratifying and confirming oral direction of Court made 8-3-44 for procuring physical examination of defendant.

UNITED STATES OF AMERICA,
Western District of New York, ss:

I, May C. Sickmon, Clerk of the United States District Court in and for the Western District of New York, do hereby certify that the annexed and foregoing is a true and full copy of the original docket entries to date now remaining among the records of the said Court in my office.

4 In testimony whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Buffalo, New York, this 26th day of October A. D. 1944.

[SEAL]

MAY C. SICKMON,
Clerk.
ZENIA J. S. BRYON,
Deputy Clerk.

In District Court of the United States, Western District of New York

Indictment

At a stated term of the District Court of the United States of America for the Western District of New York, begun and held at the Courthouse in the City of Rochester within and for the District aforesaid, on the second Tuesday of May in the year of our Lord one thousand nine hundred and forty-four, before the Honorable Harold P. Burke, Judge of the said Court.

WESTERN DISTRICT OF NEW YORK, *ss:*

The Grand Jurors of the United States of America, within and for the District aforesaid, then and there sworn and charged to inquire for the said United States of America and for the body of said district, do upon their oaths, present that Michael J. DiRe, alias Mike J. DiRe now or late of Buffalo, in the County of Erie with force and arms, etc., to wit, at Buffalo, in the County of Erie, in the said Western District of New York, and within
5 the jurisdiction of this Court, heretofore, to wit, on or about the 14th day of April 1944 did then and there, knowingly, wrongfully, unlawfully and wilfully, have in his possession a quantity of counterfeited gasoline rationing coupons, which said possession was in violation of the provisions of Section 1394.8178 of Ration Order No. 5C, issued by the Office of Price Administration, pursuant to the provisions of the Second War Powers Act of 1942; all of which is contrary to the form of the statute of the United States of America, in such case made and provided, to wit, Section 301 of the Second War Powers Act of 1942 and the Amendments, Regulations, Orders, and Schedules made and promulgated in pursuance thereof, and against the peace and dignity of the said United States of America.

GEORGE L. GROBE,
Attorney of the United States in and for the Western District of New York.

In United States District Court, Western District of New York

Case No. 3746–C

UNITED STATES OF AMERICA

vs.

MICHAEL DIRE, DEFENDANT

Bill of exceptions

Trial before Honorable John Knight, United States District Judge for the Western District of New York, at
6 Jamestown, New York, Tuesday, August 8th, 1944, at 10 A. M.

Appearances

Honorable George L. Grobe, United States Attorney for the Western District of New York, by Eugene J. Donnelly, Esq., Assistant United States Attorney, appearing for the Government.
Charles Joseph McDonough, Esq., Attorney for the Defendant.

PROCEEDINGS

(Mr. Donnelly made a short opening address to the jury.)
(Mr. McDonough made a short opening address to the jury.)

ARTHUR A. GROSS, a witness called by and on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. DONNELLY:

Q. Mr. Gross, you a member of the Buffalo Police Department?—A. I am.

Q. In what capacity do you serve in the Police Department?—A. Acting detective in the Detective Bureau.

Q. How long have you been a member of the Buffalo Police Department?—A. 14 years next month.

Q. How long a detective?—A. Acting detective about 7 years.

Q. Do you know the defendant, Michael DiRe?—A. I do.

Q. Will you tell the Court and jury where you first saw him?—A. On April 14th, 1944, I saw Michael DiRe parked
7 in an automobile on Arkansas Street, and the machine was occupied by two other men.

The COURT. By him and two other men?

The WITNESS. Yes.

Q. Now, Arkansas Street is a street in the City of Buffalo, New York?—A. That is right.

Q. And runs in what direction?—A. I could not say as to the direction, but it was about 100 feet from Barton Street.

Q. Arkansas Street parallels Niagara Street?—A. I believe it does.

Q. And the nearest main artery to it is Niagara?—A. Yes. There is Ferry, too.

Q. Tell us what you observed and what you did.—A. This car was parked at the curb, and was occupied by DiRe, who was sitting on the right, and a man by the name of Buttitta, who was sitting at the wheel. There was a man named Reed, who was sitting in the rear seat.

Q. The defendant, Mr. DiRe, was seated next to the driver, Mr. Buttitta, and in the back seat was Mr. Reed?—A. Yes.

Q. Did you get closer to the car?—A. This car was parked at the curb, and we got out and approached the car. I went to the right side, and Mr. Neff and Mr. O'Connell went to the left side of the car. The right door did not open, and I had looked in and seen the man in the rear seat, named Reed. He had two coupons in his hand, and he was asked where he got these coupons. He s'id he got them from Buttitta. They were 100 gallon inventory coupons.

Q. Have you those with you?—A. I have not got them. I believe Mr. O'Donnell has them.

Q. What else did you do at that time?—A. I questioned them and the ownership of the car and driving license, and
8 so forth. Buttitta did not have it in his possession at the time we took them in custody and ordered them into headquarters.

The COURT. Buttitta was the one driving the car?

The WITNESS. He was behind the wheel.

The COURT. He had no license?

The WITNESS. He had no operator's license.

By Mr. DONNELLY:

Q. Who did you take to headquarters?—A. Michael DiRe rode with Donald Neff, and the others in the police car.

Q. You took him to police headquarters?—A. Yes.

Q. What did you do at police headquarters?—A. We arrived at police headquarters and questioned these men, and Reed had made a statement, that he got the coupons from Buttitta. They were asked to lay their possessions out on the table, and we fou. gas coupons on DiRe—200 inventory coupons.

Q. Have you got those with you?—A. I believe Mr. O'Donnell has those also.

Q. Mr. O'Donnell was present with you at that time?—A. Yes.

Q. You asked him to put the contents of his pockets on the desk?—A. Yes.

The COURT. What became of the coupons that Reed had?

The WITNESS. Those were separate. Upon being requested to place the articles and be searched, we found two coupons, and a one A coupon and a one C, and several fuel oil coupons, and he said he received these coupons, he found them in the street some time previous.

9 The COURT. These were on DiRe?

The WITNESS. Yes.

By Mr. DONNELLY:

Q. Mr. DiRe told you he found them in the street?—A. Yes.

Q. I show you two gasoline inventory coupons, and ask if you got them at that time?—A. I did.

Q. They were initials on there?—A. Yes, sir.

Q. Are they the two coupons which Mr. DiRe, the Defendant, disgorged from his pockets at Police Headquarters onto the desk?—A. Yes.

Mr. DONNELLY. I offer in evidence two 10-gallon inventory gasoline coupons. They are joined together.

Mr. McDONOUGH. I would like to request a preliminary examination of the officer as to the circumstances under which these were originally taken from the defendant.

The COURT. Were these men under arrest?

The WITNESS. They were, Your Honor. They were in custody.

The COURT. You question the right to search?

Mr. McDONOUGH. I do. That is why I made my request for a preliminary examination as to the circumstances of the arrest, before the coupons are allowed in evidence.

The COURT. He says they were under arrest.

Mr. McDONOUGH. That is what I would like to ask him about.

Mr. DONNELLY. I believe, Your Honor, that a preliminary examination would be out of order at this time, until we have the whole of the witness' testimony. He has only begun.

10 The COURT. I will deny the request.

Mr. McDONOUGH. I do not think I am foreclosed from that.

The COURT. I have denied the request.

Mr. McDONOUGH. I will ask Your Honor to reserve decision on the offer of the coupons in evidence until my cross-examination.

Mr. DONNELLY. I offer them for identification and ask that they be marked "Government's Exhibit No. 1" for identification.

(Thereupon the coupons above referred to were marked as "Government's Exhibit No. 1" for identification.)

By Mr. DONNELLY:

Q. What was the actual time of arrest on Arkansas Street?—A. About 6 P. M., April 14th.

Q. And at what time in the police station, did the defendant disgorge the Defendant's Exhibit 1 for identification?—A. About 6:30.

Q. When did you next see the defendant, Mr. DiRe, in the police station?—A. In the police station.

Q. At about what time?—A. He was being questioned, and about 8 P. M., he was being booked, and he was searched, and upon searching him, he said he was a little ticklish. We gave them a thorough search before we put them in the cell block.

The COURT. You claim you found these coupons prior to then?

By Mr. DONNELLY:

Q. You proceeded to search him again?—A. Yes.

Q. Preliminary to putting him in the cell block.—A. Yes.

11 Q. What did you do at that time?—A. Well, whenever we got near his privates, he said "Do not do that. I am ticklish."

Q. What did you do?—A. I pulled his shirt out, and he had a jacket on, and opened the front of his trousers, and between that shirt and his underwear, there was an envelope concealed on his person. There were figures in pencil "100" on the outside.

Q. Have you got that with you?—A. I have.

Q. Did you open that envelope?—A. I did.

Q. And examined the contents?—A. I did. When I found this, he said "I'm gone."

Q. Is this envelope and the contents the same as you took from his person?—A. They appear to be the same. Yes, they are.

Q. You have initialed them and identified them?—A. Yes.

Mr. DONNELLY. I offer these likewise for identification, and ask they be marked "Government's Exhibit No. 2" for identification, both the envelope and the contents.

(Thereupon the envelope and contents above referred to were marked as "Government's Exhibit No. 2" for identification.)

By Mr. DONNELLY:

Q. Did you count these?—A. There were 100 inventory coupons, each good for 100 gallons.

Q. Now, did you see him any further that evening?—A. Yes; we found these after being booked.

Q. I cannot hear you.—A. After being booked we informed him—or rather, we questioned him further as to the possession of these coupons. He had said he got them off of a man named Joe at an address near Andy's place.

12 Q. What is Andy's place?—A. It is a tavern located at 20 Genesee Street, and the Lower Terrace.

Q. Did he say anything else?—A. He said he did not know the man's name. He said he was just keeping them for him.

Q. Did he offer to tell you where Joe was?—A. He said he did not know. He said he was from out of town, and he did not know.

Q. When did you next see Mr. DiRe?—A. I saw him at the hearing.

Q. Did you see him at any later date?—A. Yes; at the investigation of crime in the City of Buffalo at a later date.

Q. And what did he say to you?—A. He made no admissions about it.

Mr. McDonough. I object to that as incompetent, irrelevant, and immaterial. I cannot anticipate what the Government may be getting into. I object to any testimony except the alleged possession of these coupons.

The Court. What did he say?

The Witness. He said he did not know. It was the same story, that it was Joe.

Mr. Donnelly. You may ask.

Cross-examination by Mr. McDonough:

Q. Officer Gross, did you know the other occupants of the car before you walked up to Buttitta's car on Arkansas Street that day?—A. I had never seen Reed, but I had known Buttitta by reputation.

Q. You had followed the car?—A. Yes.

Q. You had the license number?—A. Yes, sir.

Q. You knew it was Buttitta's car?—A. Yes, sir.

Q. You had been following Buttitta's car?—A. Yes.

13 Q. Up to that time, did you know who the other occupants of the car, outside of Buttitta?—A. I did not know them by name.

Q. From where did you follow the car?—A. We got the car at the stop at West Ferry and Niagara Streets, and about five minutes later we located it standing on Arkansas.

Q. Did you know that Reed had an appointment to meet Buttitta at the Deco stand? Some one in that party knew that Mr. Reed was supposed to meet Mr. Buttitta, the owner of the automobile, at the Deco stand?—A. Yes.

Q. Reed told you?—A. He did not tell me.

Q. He told somebody in that party; in your party?—A. I do not know. We had information this man was peddling gasoline coupons.

Q. You did find that Buttitta was going to meet Reed in connection with these gasoline coupons?—A. Yes.

Q. At the time you did not know who was in the car other than Buttitta?—A. No.

Q. You followed the car over on Arkansas Street?—A. It was parked at the curb, and we had stopped the car because it was easy to see the truck.

Q. Who was in the truck?—A. There as nobody in the truck.

Q. Where was the truck parked?—A. Right directly behind this Plymouth car.

Q. When you walked up to Buttitta's car and you say Buttitta, the man who had the appointment with Reed, was behind the wheel, and DiRe was sitting next to him in the front seat? Is Mr. Reed here in court today?—A. Yes.

Q. This gentleman next to the jury?—A. Yes.

Q. You went to the left or right-hand door.—A. The right side.

14 Q. And the minute you opened the door, you saw this gentleman, Reed, two coupons?—A. I could not open the door, I do not know whether the door on the other side was opened by the investigators, or Mr. Buttitta himself.

Q. Did you look through the window?—A. I did.

Q. And you saw Mr. Reed with what looked to be gasoline coupons?—A. Yes.

Q. Did you then open that door?—A. I could not open the door.

Q. Somebody grabbed the coupons out of Mr. Reed's hands right away?—A. That was Mr. O'Donnell.

Q. Did you hear Mr. O'Donnell immediately ask Mr. Reed who he got them from?—A. Yes.

Q. And he said he got them from Buttitta?—A. Yes.

Q. And you have those two coupons?—A. Yes.

Q. Are those here in court today?—A. I do not know if they are. Mr. O'Donnell would have them if they are.

Q. Then you ordered the men to get out of the car, did you not?—A. They were getting out of the car then.

Q. You searched the three of them then, did you not?—A. Not thoroughly.

Q. I say you searched them?—A. I searched them for weapons.

Q. Did you search them?—A. If you call that a search. I felt at the outside of their clothing, but I did not go into their pockets.

Q. Did you search DiRe?—A. No; but I felt along his clothing.

Q. You did not find any dangerous weapons on his person?—A. No.

Q. You did not arrest DiRe at that time?—A. I placed all three of them under arrest for possession of those stamps.

15 Q. DiRe did not have any stamps at that time, as far as you know?—A. No.

Q. He was simply sitting in the car with the man who sat in the back seat with two gasoline coupons in his hands; isn't that right?—A. Yes.

Q. You did not know at that time whether they were legitiinate or counterfeit?—A. No; I don't even know now.

Q. You questioned Mr. Buttitta about his driver's license?—A. Yes.

Q. And found he did not have it with him?—A. Yes.

Q. Did he have one?—A. Yes.

Q. But he did not have it in his possession; on his person?—A. No.

Q. That is the reason you arrested Buttitta?—A. Also illegal possession.

Q. Mr. Buttitta and Mr. Reed?—A. Yes.

Q. And Mr. DiRe?—A. Yes.

Q. Mr. DiRe was simply a passenger in the car?—A. Yes; he was taken along for questioning about the stamps.

Q. Was he arrested?—A. Yes; he was taken into custody.

Q. You claim now he was then and then arrested in the car on Arkansas Street?—A. He was ordered into the Police Headquarters. He was taken into custody, call it what you will.

Q. I want to know.—A. Any arrest is taking a person into custody, which I did. I did not tell him what for.

Q. Will you tell whether or not he was arrested at the car?—A. Yes.

Q. That is your last and final answer? He was arrested there?—A. Yes.

Q. Do you recall testifying at the hearing before

16 Commissioner Boyce H. Butterfield, on May 22nd, this year?—A. I do.

Q. Do you recall your testimony as given on that occasion?—A. I do.

Q. What time did this affair take place out on Arkansas Street?—A. About 6 P. M.

Q. You claim it was about 6 o'clock?—A. Wait a minute. About 5 P. M. I have it written down here. It was about 5 P. M.

Q. So that the coupons, which you say DiRe voluntarily took from his person and put up on the desk at Police Headquarters,

that was not done until about an hour later?—A. Approximately.

Q. Approximately?—A. Approximately.

Q. Is your memory as to the time you arrested the gentleman on Arkansas Street correct?—A. Yes; it was about 5 P. M.

Q. Did you testify before Commissioner Butterfield it was about 4:45 P. M.?—A. I am quite sure I testified about 5 P. M.

Q. I am referring now to some notes taken by me at that hearing. You say it was your recollection you testified at that hearing it was about 5 P. M.?—A. That is my notes.

Q. Would you mind allowing me to take a look at those notes?—A. Is it all right, Mr. Donnelly?

Mr. DONNELLY. Yes: it is perfectly all right.

By Mr. McDONOUGH:

Q. Now, here, Officer Gross, what was the original typed figure of this time, when this original note was typed out?—A. I believe it is 5.

Q. As originally typed it read 5:45?—A. Yes, sir.

Q. Now, when did you change this?—A. I do not remember, but the time is 5 P. M.

17 Q. When did you change the 5 to a pen and ink four?—A. That is not a pen and ink four.

Q. When was the change made from the original typewritten 5 to a 4, which is written over it now? When was that done?—A. I do not recall.

Q. That is all you want to tell us? That you do not recall?—A. That is right; I could not say.

Q. Now, in your description of what took place over on Arkansas Street, you stated "We then took these men in cars to Police Headquarters;" is that right?—A. Yes.

Q. Now, I have here among my statements on these notes—I will ask you this: You testified this morning that the stamps—that among the stamps which Mr. DiRe put down on the desk at headquarters, were a one A coupon and one B coupon?—A. Yes.

Q. Did you testify before Commissioner Butterfield that he put down a one A coupon, a one B coupon, and a C coupon?—A. I do not recall. I stated several coupons.

Q. Let me call your attention again to your notes. Were these typewritten out by you?—By the way, did you also testify at the hearing before Commissioner Butterfield that Mr. DiRe possessed these inventory coupons?—A. I do not believe I did.

Q. Pointing out the notes taken by me at that hearing, and ask you whether or not those refresh your recollection any as to what you testified last May?—A. It says——

The COURT. Are those notes taken by the Commissioner?

Mr. McDONOUGH. No; by me. (Resuming to witness.) After reading my hearing notes, is your recollection or memory refreshed at all as to what you testified to?

The WITNESS. It is substantially the same.

18 Q. Did you then testify that among the coupons taken from him was this C coupon?—A. I have told you what I testified to. I also testified according to my notes.

Q. Well, here—here are the Commissioner's notes. What do they show that you testified?—A. One A, one B, one C, and six 100-gallon coupons.

Q. And you now testify that you found one A, one C, and two 100-gallon inventory coupons?—A. That is right. Those were in his possession. That is right.

Q. Why this change from this to two of the inventory coupons? Any particular reason?—A. I do not know. These are the notes I believe I have testified to before.

Q. Let us consult your own notes as originally typed out. You have written over it, too?—A. Yes.

Q. As original typed, you had one B?—A. Yes.

Q. And that is crossed out?—A. Yes.

Q. It is your testimony now, I take it, that you want this Court and the jury to believe that the coupons Mr. DiRe put on the desk were one A, one C, and two 100-gallon inventory coupons?—A. He had several coupons there.

Q. I am asking about gasoline coupons. There was one A, one C, and two 100-gallon coupons?—A. Yes.

Q. He also had a number of fuel oil coupons?—A. Yes.

Q. How many?—A. I do not know.

Q. Those are O. P. A. coupons?—A. Yes.

Q. Was an investigation made as to the legitimacy or illegitimacy of the coupons?—A. I do not know. I believe the O. P. A. did make such an investigation.

Q. I see. You claim now that DiRe was arrested at the car on Arkansas Street, do you?—A. That is right.

Q. Did you, or did you not testify at the hearing before
19 the Commissioner that DiRe was not arrested at the car, but was told he was taken in for investigation?—A. I believe I so testified.

Q. Do you want to tell the Court and jury now that the Defendant, DiRe, was arrested at the car on Arkansas Street?—A. He was what you would call under arrest. He was taken into custody.

Q. Was he, or was he not, arrested?—A. Yes.

Q. You had no charge placed against him?—A. I had no charge.

Q. You arrested him without reason?—A. He had possession of the coupons.

Q. You had not as yet got any coupons from DiRe?—A. No.

Q. The only ones you got were from Mr. Reed, and he told you he got them, not from DiRe, but from Buttitta, the driver?—A. That is right.

Q. Yet you arrested DiRe?—A. Yes.

Q. You told us you searched DiRe once at the car?—A. Yes.

Q. When did you next search him?—A. He was searched in Police Headquarters. He was asked to bring all his possessions out, which he done, before being placed in the cell block. He was given a thorough search.

Q. How about before—at 6 o'clock, when he put the other coupons on the desk—was he searched thoroughly?—A. His pockets were possibly gone through.

Q. Was he or was he not?—A. By myself and the O. P. A.

Q. Did you go into his pockets?—A. I do not recall.

Q. Did any one go into his pockets?—A. I don't believe they did. I do not know.

Q. So far as you could see at that time, was he given a thorough search?—A. Not what I call a thorough search.

Q. This was in what room in Police Headquarters?—A. The Bureau of Criminal Investigation.

Q. What time was this?—A. I take it about 6:30.

Q. What was done with the defendant, DiRe, then?—A. He was questioned from then on until 8 o'clock.

Q. Was he in the same room with Reed and Buttitta?—A. No.

Q. Where was he taken?—A. DiRe was in the Bureau of Criminal Investigation.

Q. This was at 6:30 when the second search was made, when you believe some one went through his pockets? Where was he from that time until 8 o'clock when you claim you searched him again?—A. In the Bureau of Investigation.

Q. Where is that?—A. On the third floor.

Q. Was he alone?—A. I was in the office most of the time.

Q. You were questioning DiRe at all times?—A. Not continuously, but practically all the time.

Q. Eventually you decided to put a charge against him; is that right?—A. That is right.

Q. There had been no charge put against him at the time you made this final charge?—A. There had been no charge.

Q. He had been in Police Headquarters, you say, for some three hours, and still no charge placed against him?—A. No.

Q. Was he searched again between 6:30 and 8 o'clock when you say you made this final search?—A. I do not believe so.

Q. How many times was he searched?—At the car you felt of his clothing—at Police Headquarters about 6:30 and

21 then again at 8 o'clock. Up to the time of the final search, no charge was placed against him?—A. No; we were investigating him for the possession of these stamps.

Q. Up to this time, no charge had been placed against him, and finally you claim you searched him again about 8 o'clock?—A. Yes.

Q. And this is the time you claim you found this envelope, Government's Exhibit No. 2 for identification, upon the person of Mr. DiRe?—A. Yes.

Q. How was it fastened?—A. He had a jacket and sort of a lumber shirt on. He had old clothes on. I do not recall the color.

Q. Did he have a red plaid hunting shirt or working shirt?—A. It was a heavy woolen material.

Q. They both came outside his trousers?—A. Not the shirt.

Q. The shirt was tucked into his trousers?—A. That is right. The shirt where I found the stamps.

Q. He was in working clothes?—A. Yes.

Q. It was only after you claimed that you found this envelope with these coupons on the person of Mr. DiRe that any charge was placed against him? Is that right?—A. There was no charge placed against him.

Q. Wasn't there any charge placed against him then? He was locked up without any charge being placed against him?—A. He was held for further investigation.

Q. And no charge placed against him?—A. Until the following da[illegible].

Mr. McDonough. I think that is all, Officer.

The Court. You say you found the 100-gallon coupons?

The Witness. The first time we found any was about 6:30 P. M.

22 The Court. That was the 100 gallons?

The Witness. No; that was found around 8 P. M.

The Court. What did you find when you searched at 8 o'clock?

The Witness. That was 100 stamps—inventory stamps in the concealed white envelope.

The Court. You testified before the Commissioner that you found these 100-gallon inventory coupons? You took them from his clothes?

The Witness. Yes; I believe that was about 6:30.

The Court. All right.

Redirect examination by Mr. Donnelly:

Q. Mr. Gross, from your experience as a police officer—your experience of seven years—in investigating—when you come on more than one person or two persons together, why do you——

Mr. McDonough. I object.

The Court. Sustained.

EDMUND M. O'DONNELL, a witness called by, and on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. DONNELLY:

Q. What is your education, Mr. O'Donnell?—A. Bachelor of Arts Degree from Notre Dame University.

Q. You are now employed by the O. P. A. as an investigator?—A. Yes.

Q. When did you first become employed by that department?—A. January 15th of this year.

23 Q. Prior to that time, where were you employed?—A. F. B. I. Special Agent.

Q. Do you know the defendant, Michael DiRe?—A. Yes.

Q. Tell the Court where you saw him, and how you happened to be there. I want all the facts.—A. I first saw the defendant sitting in an automobile, on Arkansas Street in the City of Buffalo about 5 P. M., this was on April 14th, 1944. We had been following the automobile driven by Frank Buttitta. We followed it from West Ferry and Niagara Street to——

Q. Why did you follow it?—A. Because we had information that Buttitta was selling counterfeit gasoline coupons, and was going to sell them that afternoon to a man named Reed.

Q. Who told you that?—A. Reed did.

Q. Therefore, you were following that automobile?—A. Yes; we followed the automobile to Arkansas Street. We got out of the car, opened the door, and told Buttitta to get out into the street. Mr. Gross went around the front of the automobile and was unable to open the door, because the handle was knocked off. I recall seeing Reed with two coupons in his right hand.

Q. Have you those coupons?—A. I have.

Q. I ask that they be marked for identification at this time, coupons taken from the hands of Mr. Reed by Mr. O'Donnell.

(Thereupon the coupons taken from Mr. Reed, referred to, were marked as "Government's Exhibit No. 3" for identification.)

By Mr. DONNELLY:

Q. Go on, Mr. O'Donnell.—A. I asked Reed where he got the coupons, and he said "I got them from him" [pointing to Buttitta].

24 Q. What happened?—A. After Detective Gross got the defendant out of the car, and Mr. Gross, the defendant and Buttitta were all standing in the middle of the street, Mr. Gross gave the defendant and Buttitta a quick frisk, and said "We will take them to headquarters." I rode down with Buttitta and

Reed drove his truck down, driving between the police car and the other car.

Q. When did you see the defendant, DiRe?—A. We took him up to the third floor into the office there. He was told by Detective Gross to empty his effects on the table, which he did.

Q. What did he disgorge on the table?—A. Six 100-gallon coupons—one A, 10 C, and I think 54 fuel oil coupons.

Q. Have you those with you?—A. Yes, sir.

Q. Let me see them, please. You heard Mr. Gross testify there were only two. How many were there?—A. Six.

Q. Why are there only two?—A. I sent them to our New York office to determine whether they were genuine.

Mr. DONNELLY. I ask that these be marked for identification.

(Thereupon the coupons, above referred to, were marked as "Government's Exhibit No. 4" for identification.)

By Mr. DONNELLY:

Q. Did you have any conversations with this defendant?—A. I did.

Q. Will you state them, please?—A. Upon the first interview, he said that he had just finished work, and had met the defendant who had asked him to go for a ride, and that is how he happened to be in the automobile. We asked where he got the coupons he had in his possession. He said they were given to him. He said he got the additional oil coupons from customers, to whom he had delivered oil that day.

Q. What did he mention about coupons, which are Exhibit No. 1?—A. He said somebody gave them to him.

Q. Did he say anything pertaining to the coupons discovered in the envelope on his person?—A. When Mr. Gross took them off of him, he said "I'm gone." We asked where he got them, and he said a man by the name of Joe had given them to him down in Andy's place, a tavern down on the Terrace.

Mr. DONNELLY. You may ask.

CROSS-EXAMINATION

Mr. MCDONOUGH. May I see the Commissioner's trial notes, Your Honor?

By Mr. MCDONOUGH:

Q. Well do you claim now, Mr. O'Donnell, that you saw six inventory coupons which DiRe put up on the table in Headquarters?—A. Yes. That is my recollection.

Q. Did you so testify before Commissioner Butterfield at the preliminary hearing?—A. I believe I did.

Q. Let me show you the Commissioner's original notes, and ask whether his notes refresh your recollection. He has briefed your testimony. Now here, he said "Took him to police." Then "Found one C, one A, 110, two inventory 100 gallons—55—53 gallons fuel oil coupons."—A. Then I was mistaken. I recall there were six taken.

Q. Now, it appears that you testified before the Commissioner there were only two 100-gallon coupons. There were only two put on the table by DiRe? There is no doubt about it, is there, that whatever coupons Mr. DiRe produced at that time when
26 he was first taken to Police Headquarters were produced voluntarily?—A. As far as I know. He was told to empty his pockets.

Q. And he did so?—A. Yes.

Q. Did it voluntarily?—A. Yes.

Q. Now, you claim you sent four coupons down to your New York office?—A. Yes.

Q. Are they here today?—A. No.

Q. They have never been returned?—A. No.

Q. And two of these alleged six coupons are kept and are marked "Government's Exhibit No. 1" for identification here today?—A. That is right.

Q. What time did you say it was that Mr. DiRe put the coupons, the A, B, and C, and fuel oil coupons on the table?—A. I would say about 6:15 or 6:30.

Q. You testified at the preliminary hearing that you were a counterfeit specialist employed by the O. P. A.?—A. Yes.

Q. Have you examined, first of all, the A coupons and the C coupons in Mr. DiRe's possession?—A. Yes.

Q. Did you find them to be genuine?—A. Yes.

Q. Did you examine the fuel oil coupons in Mr. DiRe's possession?—A. Yes.

Q. Did you find them to be genuine?—A. Yes.

Q. Have you made a preliminary examination of the two one hundred gallon inventory coupons marked "Government's Exhibit No. 1" for identification?—A. Yes.

Q. But the other four coupons, which you say he produced that day, have never been returned?—A. No; they merely sent us an opinion——

Q. I see. They have never been returned?—A. No.

Q. They were sent down there some time in April?—A. I would say probably April 15th or 17th.

27 Q. About four months ago?—A. Yes, sir.

Q. By the way, you also searched Buttitta?—A. No; I did not search Buttitta.

Q. Some one did in your presence?—A. Yes.

Q. You found a number of coupons on him?—Is that right?—A. Yes.

Q. And you also testified, as Officer Gross did, that immediately when you opened the door and seized the coupons from Mr. Reed, you asked whom he got them from, and he pointed to Buttitta, the driver, and said he got them from him?—A. Yes, sir.

Q. Now, you took a written statement from Mr. Reed, did you not?—A. Yes.

Q. And no written statement was taken from the defendant, DiRe, at any time?—A. Not by me.

Q. This is the question I neglected to ask Officer Gross. You know there was no written statement taken from him?—A. Not as far as I know.

Q. You have never seen any?—A. No.

Q. It is reasonable to suppose that any documentary evidence would be shown to you?—A. Yes.

Q. Although one was taken from Mr. Reed, you say?—A. Yes.

Q. Now, you testified, Mr. O'Donnell, to everything that you considered of importance in this case at the Commissioner's hearing?—A. I believe I did.

Q. You testified as to your conversation with the defendant, DiRe, both at the car and at Police Headquarters that day, did you not?—A. I believe I did; yes.

Q. I wish you would look through the Commissioner's brief on your testimony——.

28 Mr. DONNELLY. If it please the Court, I think the jury should be instructed it is the Commissioner's impression of what he heard.

The COURT. I will allow him to look at the notes.

By Mr. McDONOUGH:

Q. Will you look through that statement, and see whether you see anything about any statement which you now claim this defendant made when these 100 coupons were found, as far as saying "I'm gone"?—A. I do not find it in mine.

Q. Will you look at Officer Gross' testimony, and see whether you find anything in the Commissioner's statement as to his testimony?—A. No, sir; I do not.

Q. You know as a matter of fact that you testified to no such statement at the Commissioner's hearing?—A. No; I do not see anything here that indicates that.

Mr. McDONOUGH. That is all.

Redirect examination by Mr. DONNELLY:

Q. One question, Mr. O'Donnell. The envelope which contained the 100 coupons, as recovered or removed from the defend-

ant's person by Mr. Gross, were any of those stamps removed for examination?—A. Yes, sir.

Q. Do you recall the number?—A. Five or six.

Q. They were for chemical examination?—A. Yes.

The COURT. Will you describe where the envelope was found?

The WITNESS. In his trousers, in between the heavy shirt he had on and his undershirt.

The COURT. That is all.

Mr. DONNELLY. That is all.

29 HARRY G. KLENK, a witness called by and on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. DONNELLY:

I wish to offer in evidence at this time Government's Exhibits Nos. 1, 2, 3, and 4.

Mr. McDONOUGH. I will ask your Honor to excuse the jury while I argue at length on this.

The COURT. The jurors are excused until 2 o'clock. In the meantime you are not to discuss this case with any one until it is finally submitted to you.

(Jury left court room at this time.)

Motion to suppress evidence and exhibits, etc.

Mr. McDONOUGH. I object to the admission of the four Government exhibits, Nos. 1, 2, 3, and 4 in evidence, on the ground that the search of the defendant was illegal—and I also move that the evidence and exhibits be suppressed on the same grounds. It is conceded that when a legal arrest is made on probable cause an officer may search the person arrested, and that any material evidence found in that search may be admissible. At the scene of this alleged offense on Arkansas Street on April 14th, 1944, at somewhere between five and six P. M., did the police have probable cause to search and arrest Michael DiRe at that time? We have a situation here concededly where the police might arrest Buttitta because he did not have an operator's license. Concededly they might arrest Reed, because they found in his possession two 100-galion coupons. Now, as to the defendant DiRe, we find him in the case as a passenger, pure and simple. The Court will bear

30 in mind that the car in which the illegal transaction took place was not DiRe's car. The defendant is not liable to arrest. The defendant, DiRe, is a passenger in that car, pure and simple—up to that point neither the police nor the O. P. A. have one bit of evidence to connect DiRe with the crime. Reed said subsequently "I got these coupons from Buttitta." It appears that

Reed told them he was just finished work and had been invited to go along for a ride by the driver of the car. Up to that time, I consider, your Honor, there was no probable cause for arrest, although Officer Gross claims that he forthwith arrested the defendant. I submit the testimony in that respect is questionable, because in his testimony, two or three times, he was asked as to whether he was merely ordered to Headquarters for investigation or arrested, but in his final statement he said that he was arrested. I submit there was no probable cause.

Your Honor will keep in mind the testimony of Officer Gross, and also Officer O'Donnell, who just testified that no charge was placed against the defendant DiRe. He was searched, not only at the car, but he was searched at Police Headquarters, and instructed to put what he had in his pockets on the table. He was held for some three hours by these officers without charge, and even after the alleged counterfeit inventory coupons were found on him, still no charge was placed against him.

I submit the search was illegal, and the arrest was illegal, and on the face of this I object to the introduction of these coupons, and move that this evidence should be suppressed.

31 Mr. DONNELLY. If it please the Court, the question of arrest may always be divided into an arrest with a warrant and an arrest without a warrant. If it is made with a warrant, it is presumed that the officers have a reasonable ground. The most frequent are the arrests made without a warrant, but with reasonable cause to believe that crime is being committed.

Now, Officer Gross, and Inspector O'Donnell testified they had information that the defendants were about to make a deal in coupons. That Buttitta was about to make a deal,—and they were justified in following them down Ferry Street, or whatever devious path they traversed to Arkansas Street, and looking into that car. Upon looking in that car and observing the man, Reed with coupons in his hand, they had reason to believe that all persons in that car were involved in that crime, either as accomplices, or otherwise.

The defendant was in the car. Searches are general, and searches of this kind have always been sustained. The test is reasonableness. What would a reasonable man have done? Did the officer act unreasonably under the circumstances, when the circumstances were such as to lead a reasonable man to believe that a crime was being committed? I submit the documents should be received in evidence.

The COURT. I will receive them.

Mr. McDONOUGH. May I have an exception?

The COURT. You may. This Court will recess until 2 o'clock.

(Whereupon a recess was taken until 2 P. M.)

32 After recess, 2 o'clock P. M.

Appearances: As before noted.

(Thereupon Government's Exhibits 1, 2, 3 and 4, previously marked for identification were received in evidence.)

HARRY G. KLENK, resumed the stand on behalf of the Government and testified as follows:

Direct examination by Mr. DONNELLY:

Q. You are a member of the Police Department?—A. I am.

Q. In what capacity do you serve the department?—A. Detective Sergeant, Squad Leader covering the west side of the City of Buffalo.

Q. How many years have you been in that department?—A. 20.

Q. 20 years?—A. Yes.

Q. Have you lived in the City of Buffalo all your life?—A. Yes.

Q. Do you know the defendant, Michael DiRe?—A. Yes, sir.

Q. How long have you known him?—A. Probably 15 years.

Q. You have heard the previous testimony as to what happened in Police Headquarters on the day of his arrest?—A. I did.

Q. You were present at the time, were you?—A. I was not.

Q. What time did you arrive there?—A. 12 o'clock midnight.

Q. Did you have a conversation with the defendant at that time?—A. I did.

33 Q. Will you state that conversation, please?—A. On the morning of April 15th, about 12:30 A. M., Edward O'Donnell, the O. P. A. Investigator and myself, went up into the cell block and talked to Mike DiRe. I asked him whom he got the stamps from.

The COURT. The stamps?

Q. The gasoline ration coupons?—A. Yes, sir. He said he got one from a fellow, but did not know his name. He said he knows him by the name of Joe, but he could not describe the fellow to me. He said he thought he lived in Rochester, and he would generally meet him in front of Andy's tavern on the Lower Terrace, and West Genesee Street, and generally would meet him on Monday afternoon.

Q. When did you next have occasion to converse with the defendant?—A. On the afternoon of June 8th, 1944.

Q. What did he say and what did you say?—A. I asked him when he last saw Frank Buttitta. He said about 3:30 P. M. on June 7th, when he was driving north on Prospect Avenue in an automobile with Frank Miano. He said the street intersection was Porter Avenue. Another automobile pulled up alongside and stopped. He got out to converse with us. The driver of this other automobile, who had been alone in his car, was Frank

Buttitta. I said "What conversation did you have with him?" He said Frank Buttitta told me he knew of a couple of fellows who could fix up the gas ration coupon arrest. I said "What did you tell them?" He said since he knew the two fellows could fix up this case, and he did not have any money, he said "I told him to go ahead and fix the case up." I asked if he had any other conversation, and he said "No."

Mr. DONNELLY. You may ask.

34 Cross examination by Mr. McDONOUGH:

Q. Officer Klenk, you say you first saw the defendant, DiRe, at Police Headquarters about 12:30 A. M. on April 15th?—A. Yes, sir.

Q. That was about six or seven hours after his arrest?—A. Yes.

Q. He had been locked up at Police Headquarters all that time?—A. Yes, sir.

Q. You also questioned Buttitta at that time, did you not?—A. Yes.

Q. And you also locked him up, did you not?—A. I did not.

Q. When I say "You", I mean the Police Department, either Officer Gross or some one else also locked up Buttitta?—A. Yes.

Q. Now, then, this gentleman, Mr. Reed, who was here this morning, and whom I do not see this afternoon, he was also questioned, was he not?—A. Not by me.

Q. You know he signed a statement?—A. I do not know.

Q. You know he did?—A. I do not know. I do not recall being told he signed a statement.

Q. You heard Mr. O'Donnell testify to that?—A. I did not know he had.

Q. You heard Officer Gross testify that Reed signed a statement?—A. I did.

Q. Did Buttitta sign a statement?—A. No, sir.

Q. It is your custom in the Police Department, after questioning defendants, to obtain a written statement?—A. If they care to give it.

Q. No written statement was taken from Mr. DiRe?—A. No, sir.

35 Q. And no written statement was taken from Buttitta?—A. No, sir.

Q. Yet you claim Mr. DiRe made these statements to you in the cell block voluntarily?—A. Yes.

Q. And when you asked Mr. DiRe in the cell block where he got the coupons, you used just those words, I assume "The coupons," did you not?—A. I believe I did.

Q. You did not say "Where did you get the A coupons, the B coupons and C coupons, and oil coupons or inventory coupons?—

A. I believe I specified the coupons he had on him. I did not specify A, B, C, or D, or anything like that.

Q. It has been testified he had several varieties of coupons on him?—A. Yes.

Q. You used the word "coupons" only, did you not?—A. Yes.

Q. Referring to gasoline or any type of coupons, you did not do that?—A. No.

Q. You simply said "Where did you get the coupons?" or "Who gave you the coupons?"—A. Yes.

Q. And he said a fellow named Joe from Rochester, whom he met on Monday afternoon.—A. Whom he generally meets.

Q. Did he say he was a customer of his?—A. He did not say he was a customer, but inasmuch as he generally meets him there on Monday afternoons, he might be.

Q. Was any attempt made to check up on him?—A. No. I asked if he knew the license number, and he said "No." He could not give any description of the car or the man.

Q. That was all the conversation you had with him that night?—A. Yes.

Q. Who was with you?—A. Ed. O'Donnell.

Q. The gentleman who testified this morning?—A. Yes.

36 Q. You next talked to him on June 8th?—A. Yes.

Q. That was while this case was pending?—A. Yes.

Q. He told you he had talked to Buttitta, when he saw Buttitta with another fellow on Prospect Avenue?—A. He was with another man.

Q. When DiRe was with another man, and they saw Buttitta and stopped and talked?—A. That is right.

Q. You said that Buttitta,—you quote DiRe as having said that when he talked to Buttitta, he said he knew a couple of fellows who could fix up the gasoline coupon case, and DiRe said "All right. Go ahead and do it, because I haven't got any money?—A. That is right.

Q. And that is the only two conversations you ever had with Mr. DiRe?—A. Relative to this case, yes.

Q. Now, you say you secured no written statement,—you nor any one else,—as far as you know secured any written from DiRe?—A. No.

Q. Were you there one time, or any time, during the evening of April 14th, before your conversation with DiRe in the cell at 12:30 on the morning of April 15th?—A. I was there until 8 A. M.

Q. How long was DiRe detained at Headquarters, before he was admitted to bail?—A. The following morning when the O.

P. A. finished their investigation. The following day he was arraigned before the Commissioner.

Q. After that conversation with DiRe, and that conversation with Buttitta—strike out that, please. Your conversation with Buttitta;—strike out the whole thing. Were you present at any time when various individuals were brought in to look at DiRe and Buttitta in Police Headquarters?—A. I was not.

Q. You do not know whether or not a number of gasoline
37 dealers were brought into Headquarters, and asked to look at the defendant DiRe and look at Buttitta and look at Reed?—A. I was not there. I did not report for work until 12 o'clock.

Mr. McDonough. That is all.

Mr. Donnelly. That is all.

Joseph R. Lipsher a witness called by and on behalf of the Government, having been first duly sworn, was examined and testified as follows:

Direct Examination by Mr. Donnelly:

Q. By whom are you employed?—A. The O. P. A.

Q. Where are your offices?—A. New York City.

Q. What department are you in?—A. The enforcement end.

Q. What branch?—A. Counterfeiting Branch.

Q. What is your title?—A. Regional Counterfeiting Specialist.

Q. What are your duties?—A. To act as final authority on all questionable ration currency.

Q. By that word do you include gasoline rationing coupons?—A. Yes, sir.

Q. Of all varieties?—A. Yes.

Q. What is your education?—A. Bachelor's degree in Science, St. Johns University.

Q. In Brooklyn?—A. Yes.

Q. How long have you held your present position?—A. I have been with the O. P. A. since the early part of January 1942.

Q. Your present position is counterfeit specialist?—A. Since December 1943.

38 Q. Since that time, how many coupons have you examined?—A. Literally thousands.

Q. Would it be tens of thousands?—A. I would say so.

Q. Have you examined Government's Exhibit No. 4 in evidence,—1, 2, 3 and 4,—in which I include the contents of the envelope?—A. Yes, sir, I have examined them.

Q. You have examined those exhibits before coming here to court today?—A. Yes.

Q. On previous occasions?—A. Yes.

Q. Are you capable of giving an opinion as to the validity or invalidity of those coupons?—A. Yes.

Q. What is your opinion?

Mr. McDonough. I object on the grounds that the witness has not been qualified, and second, that the question is being asked without the proper basis being laid as to any comparison, and on the ground that the testimony is incompetent, irrelevant, and immaterial.

By Mr. Donnelly:

Q. I will examine him further. What are the tests or standards which you apply to determine the validity or invalidity?—A. I have examined them under the ultra violet light.

Q. What does the true coupon show?—A. Certain characteristics about the paper. These coupons, while the printing of the form is on Government paper, contains papers which are not genuine.

Q. You examined these coupons, Exhibits 1, 2, 3 and 4?—A. 1, 2 and 3. I have looked at the others, and they are, in my opinion counterfeits. The fuel oil coupons appear to be genuine.

39 Q. What other standards do you apply? Standards of comparison?—A. Yes.

Q. Have you a true issue with you of the ration blank?—A. Yes, sir, I have.

Q. Have you used that as a standard of comparison?—A. These are genuine 100-gallon coupons.

Q. In connection with the government printing and engraving plant, have you any connection with that?—A. I have.

Q. How frequently?—A. I spent several weeks down there in Washington, and have visited various government printing plants in various parts of the country.

The Court. You determine by the ultra violet rays and by the papers?

The Witness. That is one of the tests, the other test would be by comparison with a 100 gallon genuine inventory coupon.

The Court. What are the distinctions sometimes made?

The Witness. In this particular coupon, for one thing, the color of ink is a much, much lighter shade of green than used for the genuine. The style of job differs. Then the over-all size, it varies by about 1/16 of an inch.

Q. You have a standard with you?—A. Yes, sir.

Mr. Donnelly. I offer the standard of in evidence.

Mr. McDonough. There is no objection to those.

(Thereupon the coupon referred to above was marked as Government's Exhibit No. 5 in evidence.)

By Mr. DONNELLY:

Q. Based on all known standards—on all known stand-
40 ards of comparison which you applied to these exhibits, what is your opinion as to their validity or invalidity?

Mr. McDONOUGH. I object to that as incompetent, irrelevant, and immaterial. No proper basis for this testimony.

The COURT. Overruled.

The WITNESS. I believe these coupons are counterfeit.

By Mr. DONNELLY:

Q. What ones do you mean?—A. Nos. 1, 2 and 4. I think No. 3 contains the fuel oil coupons.

Mr. DONNELLY. You may ask.

Cross examination by Mr. McDonough:

Q. So there is no mistake, Exhibit No. 4 contains the oil coupons. Mr. Lipsher, you speak of the ultra violet ray machine and the application of that machine for the purpose of determining the genuineness, or whether the coupons are counterfeit?—A. Yes.

Q. Will you describe that machine to us, please?—A. The machine has a powerful bulb, over which is attached a filter. The general thing in the use of the lamp, or of a lamp like that would be to bring out fluorescent qualities of the papers.

Q. What fluorescent qualities would be brought out?—A. Two on genuine paper. One, the face of the coupon, a government device which shows the Eagle on similar lines. Secondly, it might show up what is known as fluorescent fibers. Fluorescent fibers did not appear in the genuine 100-gallon inventory coupons.

Q. Let us put it this way: The ultra violet ray ma-
41 chine will bring out the background that is the American Eagle and lines of the words United States Government,—shall we call it a mark?—A. It is known as a processed design.

Q. That is manufactured or printed right into the paper?—A. Yes.

Q. Is the ultra violet ray machine very large?—A. No, sir. It can be carried.

Q. Did you bring one here?—A. No, sir.

Q. You say it would be easy enough to bring one, and you have not one here?—A. That is right.

Q. They are portable?—A. Yes.

Q. A small portable machine?—A. Yes, sir.

Q. How is it you did not bring one here?—A. I did not bring one.

Q. Did you not think it of some importance or help to the Court to distinguish these fluorescent qualities of the paper that you

described?—A. I could not say. I examined them under the light in Buffalo and in New York.

Q. You are stating that to be a fact, but at the same time you did not bring the machine itself in order to demonstrate those qualities here?—A. I did not.

Q. Are there any other tests, in addition to the violet ray will bring out these processed designs in genuine paper?—A. On the face of the coupons, no. Only the ultra ray will bring out the fluorescent qualities in the processed design.

Q. Do you not know of any other way to bring out that design?—A. No, not that design.

Q. Can you name any ingredient, which, if applied, to those genuine coupons, would bring out the design?—A. Yes. Clorax will bring that out.

Q. Is it true that any of many chemicals which contain the same ingredients as the one you described, Clorax, would accomplish the same result?—A. Yes.

42 Q. Just what is the chemical which does that?—A. I could not say offhand.

Q. Would you let me see that Exhibit No. 5, which is genuine? Now, may I see the Government's Exhibit No. 1, which are the coupons which were produced by Mr. DiRe in the police station? Exhibit No. 3 is the two coupons taken from Mr. Reed at the automobile. Exhibit No. 1 is the two coupons which DiRe is alleged to have placed on the table at police headquarters. Is that correct, Mr. Donnelly?

Mr. DONNELLY. Yes.

By Mr. MCDONOUGH:

Q. Does the ink the Government's printing presses ever run in different shades?—A. Occasionally.

Q. You can very well have coupons which show a different shade?—A. Very slight.

Q. There is a variation in different runs?—A. Yes.

Q. These coupons were printed like any other printed matter?—A. Yes.

Q. The presses are connected, and run, and after a great many have been run off, they become a lighter shade?—A. When it begins to vary, they are re-inked.

Q. The minutes they start to run through the presses, each impression makes some change in the impression?—A. Yes.

Q. Naturally it comes to a point so much lighter that whoever is in charge deems it necessary to re-ink the presses?—A. Yes.

Q. That is the same thing that happens in any other establishment—a newspaper, or anything else?—A. That is right.

Q. Now, on these genuine coupons, which you have
43 defined as Government's Exhibit No. 5, I note here show through the printing some parallel lines running through the coupons, with what appears to be the start of the word "Government." What do those read?—A. "United States Government Ration."

Q. And here you have at the right-hand side on the lower edge apparently the Eagle design to which you have referred? Is that true?—A. That is right, sir.

Q. You cannot see that from the back of the coupons. That is your process design which you talked about?—A. Yes, sir.

Q. Let us take these two coupons, which are of a lighter shade and take the paper and look at these. We see here, if you will follow me over here, I note at the left-hand corner the letters "O. U.," and down here I see "Ration"?—A. That is right.

Q. And I notice here where the lower part of the Eagle design is down here, a part that does not show on the back?—A. No.

Q. That is also part of the process design of that paper, is that true?—A. Yes, sir.

Q. I have here in my hand a bottle of Zonite, which is a popular compound. You have heard of that, of course?—A. Yes.

Q. I wish, Mr. Lipsher, you would take the two coupons, which are Government's Exhibit No. 1 in evidence, and the two coupons which are Government's Exhibit No. 5 in evidence, and wet the backs of those two coupons with enough of that Zonite to soak through them, and let them stand for a couple minutes.—A. (Witness does as attorney has requested.)

Q. Government's Exhibit No. 5, you will note that now
44 where you could see nothing before on the back, we can now see the word "Government," and what appears to be the right-hand edge of the Eagle design,—well, there does not seem to be as much of the design on this particular coupon. Will you just follow me here. You can see the processed design coming through on the back of this well, can you not?—A. Yes, you can see it.

Q. I am trying to find an Eagle design on here. There is some portion of an Eagle design on there?—A. May I see it?

Q. Maybe it shows over here. To bring out what I want, I have to put some of it on both of them. I have only applied the chemical to one of the exhibits.

Mr. DONNELLY. We are on the second one.

Mr. MCDONOUGH. One of the exhibits of Government's Exhibit No. 5, yes.

By Mr. McDONOUGH:

Q. Here is what I am getting at. Can you see the design and parallel lines and the printing and some part of the Eagle design coming through the back of the Government's exhibit No. 1?—A. I see something very faintly. It is some part of the design here.

Q. Now, if we refer to the front of the coupon, on the back of which the design is now coming through, you do see——

Mr. DONNELLY. I object to that.

The COURT. Let him state what he does see.

By Mr. McDONOUGH:

Q. Let us take this coupon.

Mr. DONNELLY. Is that the front or back?

The COURT. Referring to Exhibit No. 1.

45 Mr. DONNELLY. Is that the face?

Mr. McDONOUGH. The face. We see a part of an Eagle design and some parallel lines and the printing.

By Mr. McDONOUGH:

Q. On the back of that, after being treated with Zonite, do we see part of an Eagle design coming out immediately back of where the Eagle design is?—A. I see some parallel lines.

Q. Don't you see some printing?—A. Yes.

Q. It is apparently the reverse of what shows on the face of the coupon, is not, in that identical corner?—A. It could not very well be the reverse.

Mr. DONNELLY. I object.

The WITNESS. No, sir, I would not say that.

By Mr. McDONOUGH:

Q. I am referring to this corner right here. You see the design in the corner of some kind of a design?—A. Yes.

Q. In that same corner, on the reverse, do you not see that design?—A. No, sir. This side shows arrows, and this side shows something resembling an olive branch.

Q. You know before we applied the chemical, one of the coupons of Exhibit No. 1, and one on Exhibit No. 5, the backs were blank?—A. Yes.

Q. And whatever appears on the back on Government's Exhibit No. 1 and on Government's Exhibit No. 5, was brought out by that Zonite?—A. Yes.

Q. When we speak of this Government and Eagle design, you do not mean that each coupon has a full Eagle?—A. No.

Q. You mean the sheets are given this process of Eagle lines, and so on, and are later cut up?—A. That is right.

46 Q. Whatever particular parts of a design happens to be

on the back of one coupon does not necessarily have to be on the back of another?—A. That is right.

Q. You might have part of the words "United States Government" on one coupon?—A. Yes.

Q. And not on another?—A. Yes.

Q. It is similar to the water mark on paper?—A. It might be.

Q. Assuming that large sheets of paper are made with water marks on it, when that paper is cut up, any part of that water mark may appear on any part of that paper?—A. Yes.

Q. That is the same condition that prevails with regard to these coupons, is it not?—A. Yes.

Q. I bring that out to show we may not see exactly the same part of the design on each coupon. It may be a part of it. The coupons are cut and perforated after the design process is put on?—A. That is right.

Q. Were these coupons in Government's Exhibit No. 2 for identification put under the ultra violet ray machine?—A. Yes, they were.

Q. I do not suppose you ever applied this chemical test to any of them?—A. No, sir, I did not.

Q. The ultra violet ray test will have the same result the same as far as the processed design is concerned as the application of this chemical, will it not?—A. I do not understand.

Q. I say the ultra violet ray machine will bring out the same results so far as the processed design is concerned as this chemical?—A. No, sir.

Q. It will bring out the same results from the rear?—A. It will bring out fluorescence.

47 Q. This chemical process also brings out the processed design, does it not?—A. Yes.

Q. Now, Mr. Lipsher, as to Government's Exhibit No. 4, which contains a number of fuel oil coupons, you say these you found to be genuine?—A. They appear to be genuine.

Q. Did you examine them under the ultra violet ray?—A. I examined some of them. I would have to see them first. Yes.

Q. There were different types of fuel oil coupons there, were there not? Different colors?—A. Yes.

Q. They are all genuine, are they not?—A. They are.

Q. Well, I am still holding A and B,—wait a minute,—there is another fuel oil,—you have all the fuel oils, which you say are genuine?—A. Yes.

Q. Here are the A and C coupons. You found these genuine?—A. I do not recall examining them.

Q. Did Mr. O'Donnell also examine these exhibits?—A. I do not know.

Q. You heard him testify about it? He is also a United States Government Specialist? Did you not?—A. Yes.

Mr. McDonough. I think that is all.

Redirect examination by Mr. Donnelly:

Q. Mr. Lipsher, I ask you to look at Government's Exhibit No. 1, and ask you, after witnessing that demonstration, by Mr. McDonough, what is your opinion of it?

Mr. McDonough. I object.

By Mr. Donnelly:

Q. Has your opinion changed since his test?—A. No, sir.

Mr. Donnelly. That is all. The Government rests, your Honor.

48

Renewal of motion to dismiss, etc.

Mr. McDonough. I renew my motion to dismiss the indictment and to discharge the defendant on the grounds that the Government has failed to establish the guilt of the defendant of the crime charged, and move for the suppression of the evidence on the same grounds as previously stated.

The Court. Denied.

Mr. McDonough. Will your Honor instruct the jury that your passing on that motion has nothing to do with the guilt or innocence of the defendant?

The Court. Yes, that is true.

Mr. McDonough. I would like to call Mary DiRe. Just a moment—before calling Mrs. DiRe, I would like to call Officer Gross.

Arthur A. Gross, a witness previously sworn in behalf of the Government, was called as a witness for the defendant, and testified as follows:

Direct examination by Mr. McDonough:

Q. Officer Gross, you questioned Mr. DiRe at Headquarters, and you questioned Mr. Buttitta at Headquarters, did you not?—A. Yes, sir.

Q. You took no written statement from the defendant, DiRe, did you?—A. No, sir.

Q. You told us this morning, I believe, you did take a written statement from a gentleman named Reed?—A. Officer O'Donnell had taken the statement.

Q. A written statement was taken from Reed, was there?—A. Yes, sir, I see him making the statement.

49 Q. Your answer is "Yes"?—A. Yes.

Q. Is Mr. Reed here this afternoon?—A. I do not see him now.

Q. He was here this morning?—A. Yes.

Q. You questioned Reed at some length, did you not?—A. Yes.

Q. You have already told that when you first questioned Reed in the matter he told you he got those coupons from Buttitta?—A. Yes.

Q. Reed also told you he never saw DiRe before in his life, did he?—A. He didn't say he remembered seeing him before. I do not remember having any conversation about DiRe. I do not remember Reed saying he never saw him.

Q. Have you got Reed's statement with you?—A. No.

Q. Who has it?—A. I believe the O. P. A. Officer, Mr. O'Donnell.

Q. May I see Mr. Reed's statement? That was taken, there is no doubt about it?—A. Yes.

Q. Isn't it a fact that Reed told you in that statement and told you orally he had never seen this man before in his life?—A. I do not remember seeing it in the statement.

Q. You do say you do not remember him saying anything about DiRe?—A. I do not remember.

Mr. McDonough. That is all.

Mary DiRe, a witness called by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

Direct examination by Mr. McDonough:

Q. Mrs. DiRe, you are the wife of the defendant, Michael DiRe?—A. Yes, I am.

50 Q. And how long have you been married?—A. 6 years in December.

Q. And how many children?—A. Three.

Q. Where do you live?—A. 374 Rhode Island Street.

Mr. Donnelly. I do not think the witness knows anything of materiality here.

By Mr. McDonough:

Q. What business is your husband in?—A. Coal, fuel oil, and ice.

Q. How long has he been in that business?—A. Since I have known him.

Q. And how long have you known him?—A. About seven and a half years.

Q. Are there any other of his family in that business with him?—A. There were two of them.

Q. Who were they?

Mr. DONNELLY. I object to this.

The WITNESS. Ralph and Phil.

By Mr. McDONOUGH:

Q. Where are they now?—A. Ralph is in Italy and Phil is in France.

Mr. DONNELLY. I object to that.

The COURT. Strike it out.

Mr. McDONOUGH. I want to show that he is in sole operation of that business.

By Mr. McDONOUGH:

Q. Is your husband in sole operation of this family business at the present time?—A. Yes.

Q. And has been how long?—A. About three and one-half years, I believe.

Q. Have his two brothers been in the army during that time?

51 Mr. DONNELLY. I object.

The COURT. Sustained.

Mr. McDONOUGH. Exception, please. I think that is all. Oh, just a minute. Did you know Frank Buttitta?

The WITNESS. Yes.

By Mr. McDONOUGH:

Q. Well or casually?—A. Casually.

Q. How did you know him?—A. He lived around the block, about a block from us, and used to take ice from us.

Q. That was the extent of your acquaintance with him?—A. Yes.

Mr. McDONOUGH. That is all.

Cross examination by Mr. DONNELLY:

What was your maiden name?—A. Spano.

Mr. McDONOUGH. I object.

The COURT. Overruled.

Renewal of motion to dismiss, etc.

Mr. McDONOUGH. Exception. The defendant rests, your Honor. Let the record show the renewal of my motion to dismiss the indictment and discharge the defendant on the grounds that the People have failed to show guilt. I ask for a directed verdict of acquittal on the same grounds previously stated.

The COURT. Motion denied.

Mr. MCDONOUGH. Exception.

(Whereupon a short recess was taken.)

The COURT. The jury will disregard the relationship of the last witness to the defendant.

Charge of the court

52 Ladies and gentlemen of the Jury:

You have listened attentively to the evidence that has been adduced in this suit, and I am sure you will give it the consideration you should. The case is important.

A criminal case results through an indictment presented by a Grand Jury, and that, as I have stated to some of you before, may be described as in the nature of a complaint or pleading. It advises the defendant, jury and the Court of the charge made against the defendant.

This particular indictment charges that this defendant on the 14th day of April, 1944, knowingly, unlawfully and wilfully had in his possession a quantity of gasoline ration coupons, in violation of Sections 1394 and 8178 of the ration regulations issued by the Office of Price Administration. We all know the reason for the enactment and the adoption of these regulations. It is to conserve gasoline.

In this criminal trial, the burden rests upon the Government to establish the guilt of the defendant beyond a reasonable doubt. An understanding of the meaning of those words is not difficult. Reasonable doubt is a doubt based on thinking, on reason, on judgment. It means, as applied to this case, that if after you have heard all the evidence in this case, you find the Government has not established the guilt of this defendant beyond a reasonable doubt, then you must acquit.

On the other hand, if you find the Government has established the guilt of the defendant beyond a reasonable doubt, it is your duty to convict.

There is another rule of law to be observed, and that is as
53 regards the presumption of innocence. In any criminal trial, the presumption of innocence runs through the trial in favor of the defendant until it is overcome by the evidence. You and I can presume a great many things are true which are not true. The presumption is overcome if you find beyond a reasonable doubt that the Government has established the guilt of the defendant.

The defendant himself has not taken the stand. He had the right to take the stand if he so elected. But you are to draw no inference of guilt from the fact that he did not take the stand.

The credit you give to witnesses who testify is for you to determine. In any case, especially those of any great length, there are apt to be some variances in testimony. Memory is not infallible and witnesses may honestly make mistakes with respect to matters. If you believe a man has falsified, you have the right to disregard all of his testimony; on the other hand you have the right to accept that part of his testimony which you think is true. The weight you give testimony applies to any witness.

I do not know how the jury decides lawsuits, but I know, of course, there are certain things that jurors should have in mind in considering cases. Among these may well be the appearance of witnesses on the stand, whether they appear to you straightforward in their actions and candid in their testimony. An important thing is the question of the consistency of the story told by witnesses. Then again, you must take into consideration whether they have any motive to testify falsely or not. If you find they have an interest or motive, then you will treat their testimony with especial caution and care. There is testimony given by the wife of the defendant himself. This is to be considered with care and caution. If you believe her testimony it has the same weight as any other testimony.

54

There are two questions only to be determined in this case. The first one is whether these coupons were counterfeit, and the second is whether the defendant had them in his possession.

The regulations stated prohibit the possession of counterfeit gasoline coupons, and that no person shall transfer, receive or possess any coupons except as permitted by law. This charge here is the possession of counterfeit coupons.

Several witnesses have testified, and I will briefly refer to the testimony. My purpose in so doing is to aid you in your consideration of the testimony.

Mr. Gross of the Police Department and Mr. O'Donnell of the O. P. A., apprehended three men in an automobile. You will recall what their testimony was. These men were taken to the police station. There some search was made. We are concerned only with the search of this defendant. Mr. Gross and Mr. O'Donnell said they found several hundreds of coupons on defendant's person.

Then on later search of this defendant, they found an envelope enclosing so-called inventory coupons, which entitled a dealer to a large amount of gasoline, 100 gallons—100 of these—10,000 gallons. These witnesses testified there were found concealed on the person of DiRe. That is the testimony. There is testimony, I believe, that one of the witnesses talked to his defendant some time

after twelve o'clock, and he told him he got these coupons from Joe, who was from Rochester. It is claimed as an admission
55 made by this defendant. It is claimed he also stated where he got them in Buffalo. That, in the main, is the testimony in reference to the alleged charge.

Now, in addition to that, Mr. Lipcher testified as an expert on the genuineness of the gasoline coupons. He has had long experience in the examination of these coupons. He examined them with the ultra-violet light, and his testimony is that these coupons were all counterfeit. The coupons are here for your examination.

Something was said about Reed not testifying. It rests with the Government to establish its case, and the Government may swear or not swear such witnesses as it decides.

I think there is nothing further. You have heard all the evidence. This is an important case, important not alone to the defendant, but to the Government, important that the defendant may be restrained from violating the law that others may not similarly occupy themselves.

As I said at the outset, you will decide this case without prejudice or favoritism, and bring in a verdict of guilty as charged in the indictment or a verdict of not guilty. Anything, Mr. McDonough?

Mr. McDonough. Will your Honor charge the jury that they may find from all the evidence here as to whether he knowingly had these coupons?

The Court. Yes, he must have had knowledge.

Mr. McDonough. In that respect I ask your Honor to instruct the jury that he must have the coupons with criminal intent.

The Court. That is true.

Mr. McDonough. I ask the Court to charge the jury that by his plea of not guilty, the defendant has put in issue every charge in the case.

56 The Court. That is so.

Mr. McDonough. I request your Honor to charge the jury that there is no burden on the defendant to prove his innocence, but that the burden is on the Government.

The Court. I have already so charged.

Mr. McDonough. I ask the Court to charge that if they are not convinced beyond a reasonable doubt that the coupons in the defendant's possession were counterfeit, they must acquit.

The Court. I have already so charged.

(Thereupon the jury retired to deliberate and returned to the court room later with a verdict of guilty.)

In United States District Court, Western District of New York

[Title omitted].

Proceedings Monday, August 14, 1944 at 10:00 a. m.

Mr. McDonough. If your Honor please, in advance of sentence I would like to renew my motion made at the close of the case in Jamestown last August to set aside the verdict of the Jury. I want to move to dismiss the indictment and to discharge the defendant, on the grounds that the verdict of the Jury was contrary to law and contrary to the weight of the credible evidence, and on all the grounds stated in my motion at that time.

57 I now move further in arrest of judgment on the same grounds stated in my motion to dismiss the indictment.

The Court. Motion denied.

Mr. McDonough. Exception.

In United States District Court

Notice of appeal

Name and Address of Appellant: Michael DiRe, 374 Rhode Island Street, Buffalo, New York.

Name and Address of Appellant's Attorney: Charles J. McDonough, 1002 Walbridge Building, Buffalo, New York.

Offense: Violation of Section 1394.8178 of Ration Order #5 C issued by Office of Price Administration (possession of counterfeited gasoline inventory coupons).

Date of Judgment: August 14, 1944.

Sentence: One year in jail and fine of One ($100.00) Dollars. Execution of fine suspended.

At the present time out on property bail in the sum of $5000.00.

The above named defendant hereby appeals to the United States Circuit Court of Appeals for the Second Circuit from the judgment above mentioned on the grounds set forth below.

Dated: August 14, 1944.

Michael DiRe,
Appellant.

Charles J. McDonough,
Appellant's Attorney.

58 *Grounds of appeal*

1. The verdict was contrary to law.
2. The verdict was against the weight of the credible evidence.
3. The Court erred in refusing to dismiss the indictment and discharge the defendant at the close of the Government's case.

4. The Court erred in refusing to dismiss the indictment and discharge the defendant at the close of the entire case.

5. The Court erred in refusing to direct a verdict of acquittal at the close of the entire case.

6. The Court committed various errors in its charge to the jury.

7. The Court erred throughout the trial in its admission of evidence over objection and exception of the defendant; which evidence was prejudicial to the defendant and inadmissible on the grounds urged by the defendant at the time of the admission of said evidence.

8. The Court erred in admitting into evidence certain gasoline inventory and other coupons which were allegedly taken from the person of the defendant, and which were the result of an illegal search of the defendant.

9. The Court erred in refusing to suppress evidence illegally searched for and seized from the person of the defendant.

10. The Court erred in allowing the United States Attorney to elicit the maiden name of the defendant's wife, to the prejudice of the defendant.

59 11. The Court otherwise erred in the admission and exclusion of evidence during the trial and in its rulings in questions of law.

CHARLES J. McDONOUGH,
Appellant's Attorney.

In United States District Court

Assignment of errors

Now comes the defendant-appellant Michael J. DiRe, and files the following Assignment of Errors, and respectfully shows that error has intervened to his prejudice, to wit:

1. The Court erred in refusing to grant defendant's motion to dismiss the indictment and to discharge the defendant at the conclusion of the Government's case, and at the conclusion of the entire case, upon the ground that the evidence was wholly insufficient to make out either a prima facie case for the Government or to warrant a conviction of the defendant.

2. The court erred in refusing to direct a verdict of acquittal.

3. The Court erred in denying the defendant's motion to set aside the verdict and for a new trial and for arrest of judgment on all the exceptions taken at the trial and on the errors committed because of the introduction of evidence objected to by the defendant, to which exceptions were taken.

4. The Court erred throughout the trial in its admission of

evidence over objections and exceptions by the defendant, which evidence was prejudicial to the defendant and
60 inadmissible on the grounds urged by the defendant at the time of his objections.

5. The Court erred in refusing to grant the defendant's motion to suppress the evidence taken from the defendant at the time of his arrest, on all grounds stated at the trial.

6. The Court erred in allowing the witness Lipsher to testify as an expert as to his opinion that the gasoline coupons were counterfeit. He was not properly qualified.

7. The Court erred in allowing the prosecutor to cross-examine the defendant's wife as to her maiden name.

8. The Court erred in failing to dismiss the indictment upon the conclusion of the Government's case and at the end of the entire case.

Wherefore, defendant-appellant respectfully prays that the judgment of conviction and the sentence rendered herein by the United States District Court for the Western District of New York, be reversed and held for nought.

CHARLES J. McDONOUGH,
Attorney for Defendant-Appellant.
Office & P. O. Address, 1002 Walbridge Bldg., Buffalo, N. Y.

In United States District Court

Stipulation extending time to file record

It is hereby stipulated by and between the attorney for the United States of America, plaintiff above named, and the
61 attorney for the defendant, Michael DiRe, that the defendant, Michael DiRe, have until and including the 30th day of November 1944 in which to file the printed record in the above entitled matter.

Dated Buffalo, New York, October 25, 1944.

GEORGE L. GROBE,
Attorney for Plaintiff.

CHARLES JOSEPH McDONOUGH,
Attorney for Defendant.

So Ordered.

ALEXANDER M. BELL.

In United States District Court

Stipulation settling bill of exceptions

It is hereby stipulated by and between the attorneys for the parties hereto that the foregoing record contains all the testimony

and exceptions made and taken at the trial of this action, and that the same may be settled and ordered on file as the bill of exceptions herein.

Dated Buffalo, N. Y., November 20, 1944.

GEORGE L. GROBE,
Attorney for Plaintiff-Appellee.
CHARLES J. McDONOUGH,
Attorney for Defendant-Appellant.

62 In United States District Court

Order settling bill of exceptions

Upon the foregoing stipulation, it is ordered that the foregoing may be settled and ordered on file as the bill of exceptions herein.

Dated Buffalo, N. Y., November —, 1944.

_____,
United States District Judge.

In United States District Court

Stipulation as to record

It is hereby stipulated that the foregoing is a true transcript of the record of the United States District Court in this action as agreed upon and settled by the parties hereto.

Dated Buffalo, N. Y., November —, 1944.

GEORGE L. GROBE,
Attorney for Plaintiff-Appellee.
CHARLES J. McDONOUGH,
Attorney for Defendant-Appellant.

In United States Court

Stipulation as to exhibits

It is hereby stipulated by and between the attorneys for the parties hereto that none of the Exhibits herein need be
63 printed or otherwise included in the printed record on appeal herein; that the originals may be handed up by either party on the argument of the appeal herein with the same force and effect as if incorporated in the printed record, and that they may also be referred to in the brief of either party submitted upon argument of this appeal.

Dated Buffalo, N. Y., November 20, 1944.

GEORGE L. GROBE,
Attorney for Plaintiff-Appellee.
CHARLES J. McDONOUGH,
Attorney for Defendant-Appellant.

[Clerk's certificate to foregoing transcript omitted in printing.]

64 In United States Circuit Court of Appeals for the Second Circuit

No. 160. October Term, 1946

(Argued January 6, 1947.—Decided February 3, 1947)

Docket No. 20455

UNITED STATES, APPELLEE

v.

MICHAEL DI RE, APPELLANT

Before L. HAND, SWAN, and CLARK, Circuit Judge.

Appeal from a judgment of the United States District Court for the Western District of New York, convicting the defendant of knowingly having in his possession counterfeit gasoline ration coupons.[1]

Charles J. McDonough, for the appellant.

Michael J. McMorrow, for the appellee.

Opinion

L. HAND, Circuit Judge.

Di Re appeals from a judgment convicting him of knowingly having in his possession counterfeit gasoline ration coupons.[1] The only question necessary to discuss upon this appeal is whether the documents upon which his conviction was based were obtained in violation of the Fourth Amendment. The facts, which are substantially undisputed, were as follows. One, Reed, informed O'Donnell, an "investigator" of the Office of Price Administration, that a man, named Buttitta, was selling counterfeit gasoline coupons, and that he would sell them to Reed on the afternoon of April 14, 1944. O'Donnell and another "investigator," named Neff, called to their assistance Gross, a police detective of Buffalo,

[1] Sec. 301, Second War Powers Act of 1942.

and the three in a car followed a car in which were Buttitta, Reed and Di Re, until it was parked at the curb on Arkansas Street, Buffalo. The three officials then left their car, went to Buttitta's car, and found him in the driver's seat, Di Re beside him, and Reed in the rear seat. Reed had two gasoline coupons in his hand which, upon inquiry, he said Buttitta had given him and which proved to be counterfeit. Gross arrested Buttitta, Reed and Di Re and took Buttitta and Reed with him to a police station in his car;
Neff took Di Re. At the police station Di Re was searched,
65 and concealed upon his person were found two counterfeit gasoline coupons, each for 100 gallons. If the arrest of Di Re was lawful, the search of his person was lawful, and the conviction must be affirmed; if the arrest was not lawful, the search was unlawful, and the conviction cannot stand.

As we have said, the arrest was on April 14, 1944, the indictment was found and filed on June 23rd, and the case came on for trial August 8th; meanwhile Di Re had not moved to prevent the seized coupons from being used as evidence upon his trial. However, when the prosecution offered them in evidence, his attorney objected to their admission on the ground that the search had been unlawful; and the court excused the jury, while the question was discussed upon the merits. The prosecutor did not suggest that the application had come too late; he defended the legality of the arrest because Gross "had reason to believe all persons in that car were involved in that crime either as accomplices or otherwise." He asked: "Did the officer act unreasonably under the circumstances when the circumstances were such as to lead a reasonable man to believe that a crime was being committed?" The court overruled Di Re's objection and received the coupons in evidence, but he did not state his reasons for doing so.

We shall assume, arguendo, that Gross had authority under Sec. 177 of the New York Code of Criminal Procedure to arrest Buttitta and Reed, although the crime was not against the State of New York.[2] We shall similarly assume that the federal law determines whether the crime was a felony within the meaning of Sec. 177, and that because a conspiracy is a felony under federal law, Gross's authority was measured by Sec. 177 (2) and gave him power to arrest Buttitta and Reed. By a parity of reasoning his authority to arrest Di Re must rest upon subdivision three of Sec. 177: that is, Gross must have had reasonable ground for thinking that Di Re was a party to the conspiracy of Buttitta and Reed, which was in process of execution before his eyes. However, unless the last was true, Di Re's arrest was unlawful, because although he was in fact guilty of another crime—possessing other counterfeit gasoline cou-

[2] Marsh v. United States, 29 Fed. (2) 172 (C. C. A. 2).

pons—neither Gross, O'Donnell nor Neff has any cause to think so. The question may therefore be stated barely but entirely adequately, as follows: when an officer has been informed that two persons are to deal in counterfeit documents while they are riding in a motor car, has he reasonable grounds for believing that a third person who is riding in a car along with them is a party to that transaction? We have several times had occasion to consider what relation to a conspiracy makes a man a confederate, and what relation to the principals in a crime makes a man an abettor; and we have uniformly held that the prosecution must prove the
66 accused to have associated himself with the principals in the sense that he has a stake in the success of the venture.[3] When the Supreme Court affirmed us in *United States* v. *Falcone*,[4] it held that the sale of material to those who the seller knows will use it to commit a crime, does not make the seller a party to a conspiracy of the buyers. We do not understand that the decision turned upon the fact that the seller might not have been aware that there were several buyers acting in concert; and, so far as we can see, our doctrine is a corollary of the decision, although the opinion did not expressly go so far. The discussion in *United States* v. *Harrison*[5] must probably be taken as against our view, though the decision itself may not be.

The legality of Di Re's arrest therefore depends upon whether his presence in the car when the other two were engaged in selling counterfeit coupons, was presumptive evidence that the sale was a transaction in which he had a personal interest. It was not enough that Buttitta and Reed felt confident that he would not betray them; the law does not make one a participant in crimes which one does not denounce. It is true that failure to denounce a felony is itself a crime; but that is by separate enactment,[6] which would have been unnecessary, if knowledge followed by inaction alone made one an abettor. Even if Di Re had known that Buttitta and Reed were dealing in counterfeit ration coupons, there was not the slightest reason to suppose that he was himself either a seller or a buyer; or that he had any interest whatever in their enterprise. Indeed, even though Gross had known that DiRe was in possession of similar coupons, it would have been no reason to suppose that he was interested in the coupons being traded in. Nobody would assert that all the spectators of a crime may be arrested as participants; and even though riding in a car with

[3] United States v. Peoni, 100 Fed. (2) 401; U. S. v. Bruno, 105 Fed. (2) 921 (reversed upon another point, Bruno v. U. S., 308 U. S. 287); U. S. v. Falcone, 109 Fed. (2) 579; U. S. v. Koch, 113 Fed. (2) 982; U. S. v. Zeuli, 137 Fed. (2) 845; U. S. v. Simonds, 148 Fed. (2) 177. See also Morei v. U. S., 127 Fed. (2) 827, 831 (C. C. A. 6).

[4] 311 U. S. 205.

[5] 121 Fed. (2) 930 (C. C. A. 3).

[6] Sec. 251, Title 18, U. S. Code.

two such offenders be evidence of acquaintance, or possibly friendship, with them, it would be altogether unwarranted to carry the inference further than complaisance. So far as we can see, the arrest was utterly indefensible; a mere scooping up of all those present on the chance that any associate of the principals was probably engaged in any dealings between them, or, if not, in other transactions of the same kind; and this in spite of the fact that Reed on whose information Gross acted, had not mentioned Di Re as Buttitta's confederate. If the prosecution of crime is to be conducted with so little regard for that protection which centuries of English law have given to the individual, we are
67 indeed at the dawn of a new era; and much that we have deemed vital to our liberties, is a delusion.

The prosecution has not upon this appeal attempted to support the competency of the coupons on the ground that Di Re did not apply for their suppression before the cause came on for trial. It has done well not to do so, because it abandoned any such objection when it undertook, as has appeared in the passages we have quoted, to defend the search upon the merits. Both sides having presented the point to him in this way, we should have no warrant for supposing that the judge did not decide it; but without so indicating had refused to pass on the point because Di Re had delayed too long in asserting it. We may assume, arguendo, that, if he had chosen that for his ground, and had for that reason refused to consider the merits, he would have been within his powers,[7] but he was not obliged to do so; he was free to pass by the delay and to give Di Re the benefit of the objection, if in his judgment, that would not unduly interfere with the trial. "The rule is one of practice; and is not without exceptions."[8] The last sentence of Rule 41 (e),[9] is in this regard merely a restatement of the law as it was.[10] It would be a parody on justice now to hold that, although the judge was wrong in the decision which he did make, nevertheless, since he might have refused to make it at all, Di Re may not complain of the error.

Judgment reversed.

Dissenting opinion

CLARK, Circuit Judge (dissenting).

The ground of my dissent may be shortly stated. It is that police officers cannot be held unreasonable in declining to view as a mere bystander one who accompanies a criminal to a crime

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[7] United States v. Saili, 115 Fed. (2) 292 (C. C. A. 2).
[8] Cogen v. United States, 278 U. S. 221, 223; Gouled v. United States, 255 U. S. 298, 312, 313.
[9] Rules of Criminal Procedure.
[10] Notes of the Committee, p. 32.

rendezvous.[11] Surely rarely, if at all, will innocence be accorded such opportunity; the instigators of the meeting may seek helpers, but hardly onlookers, i. e., potential talebearers. This reaction of common sense is here supported by the other circumstances, notably the absence of any natural outcry, protest, or denunciation of his associates by Di Re on his apprehension. Less significant, but quite consistent, is the fact that Di Re was clad in ordinary work clothes. That a felony was involved is conceded. In truth there was not only the felony of conspiracy, Blumenthal v. United States, 9 Cir., Dec. 16, 1946, but also
68 the substantive felony of possessing and passing the counterfeit coupons. United States v. Serpico, 2 Cir., 148 F. 2d 95.

The issue raised concerns only the lawfulness of the arrest, for, that being established, the search follows as an incident thereto. See authorities cited by Frankfurter, J., in Davis v. United States, 66 S. Ct. 1256, 1269. Now the general and traditional rule of arrest without a warrant by a peace officer is aptly stated in the N. Y. Code of Criminal Procedure, Sec. 177, as applicable in three situations: "1. For a crime, committed or attempted in his presence; 2. When the person arrested has committed a felony, although not in his presence; 3. When a felony has in fact been committed, and he has reasonable cause for believing the person to be arrested to have committed it." Since the Serpico case shows the later finding of the counterfeit coupons upon Di Re to be a felony, it might well be contended that the second subdivision is applicable. See Wilgus, Arrest without a Warrant, 22 Mich. L. Rev. 541, 685; Holley v. Mix, 3 Wend., N. Y., 350; 18 U. S. C. A. Sec. 53a, last clause.

But accepting the third subdivision of the Statute as stating the more accepted federal principle, Carroll v. United States, 267 U. S. 132, 39 A. L. R. 790; United States v. Lindenfeld, 2 Cir., 142 F. 2d 829, 831, certiorari denied, 323 U. S. 761; 5 U. S. C. A. Sec. 300a, there would seem to be "reasonable cause" for the officers to believe that Di Re had participated in this crime admittedly being committed by Buttitta and Reed. (Actually, as later events showed, he was quite clearly a source of supply, a reserve bank, so to speak, for Buttitta in the latter's sales.) The cases have always held that it is not certainty, but only a reasonable deduction from the circumstances and positions of the parties, which justifies the arrest. See cases collected in the commentaries to the A. L. I. Code of Criminal Procedure, 1931, Sec. 21, pp. 233, 234; Miller,

[11] The opinion is in error, and misplaces the emphasis, in concluding that the officers "followed a car in which were Buttitta, Reed and Di Re, until it was parked" at a certain place. Actually Reed had informed them of "his appointment to meet Buttitta at the Deco stand, and the incident happened at the appointed time and place." The testimony of the officers shows that, while they had recognised the car earlier at a street stop light, they did not see the actual occupants until they again came upon it while it was already parked at the curb at the Deco stand.

Arrest without a Warrant by a Peace Officer in New York, 21 N. Y. U. L. Q. Rev. 61. How far this decision departs from traditional concepts is shown, for example, by such a leading case as Burns v. Erben, 40 N. Y. 463, 470, where the arrest of a visitor to a house where silver had been stolen from the basement was justified because she was the only nonmember of the family to be in the house at the time. And Woodruff, J., after analyzing the early precedents to justify the result, says that while innocent parties "may sometimes be subjected to inconvenience and mortification," yet "any more lax rules would be greatly dangerous to the peace of the community and make the escape of criminals frequent and easy," and quotes Lord Mansfield that a different rule would be "a terrible thing." See also Perkins, The Law of Arrest, 25 Iowa L. Rev. 201, 233; Beckwith v. Philby, 6 69 Barn. & C. 635, 108 Eng. Rep. 585; Samuel v. Payne, 1 Doug. 359, 99 Eng. Rep. 230; United States v. Strickland, D. C. W. D. S. C., 62 F. Supp. 468 (involving gasoline ration coupons in an automobile); and our own weaker case of United States v. Heitner, 2 Cir., 149 F. 2d 105, 106, certiorari denied, Cryne v. United States, 326 U. S. 727, where we said that "the 'reasonable cause' necessary to support an arrest cannot demand the same strictness of proof as the accused's guilt upon a trial, unless the powers of peace officers are to be so cut down that they cannot possibly perform their duties."

Of course, the test here is the normal and appropriate reactions of police officers, not the more sophisticated after rationalizations of a judge in his chambers. True, a judge, particularly an intermediate judge, cannot be insensitive to a present strong trend toward special care and consideration in criminal prosecutions, perhaps even more so where the guilt of the accused is clear. This is surely understandable in the case of many important crimes as a reasonable, even if quixotic, demonstration to a world calloused to brutality of the beneficent contrast afforded by the American spirit of fair play. But it has less desirable consequences in the enforcement of regulatory legislation, where our undisciplined individualism makes even so desirable a war measure as the conservation of gasoline resented and thw rted all too often. Here so gigantic was the task of enforcement, so few the number of federal enforcing authorities, that a breakdown of the law must inevitably have occurred unless the cooperation of local police officers was assured. Anyone who has worked at law enforcement—particularly in smaller communities, where cause and effect are more quickly and surely traced—knows how a lack of support from the agencies higher up is accepted as a legitimate excuse for weariness or laxity of the officers on the street. That does not excuse illegality. It does suggest that a decision which

must operate as a limiting direction to the police should carry conviction of its own accommodation to the realities of everyday life and the practical thinking of ordinary persons, lest it discourage honest effort at necessary policing. I venture to believe that, given a few restrictive and ununderstood decisions of this nature, the local police would be led to leave the federal men to their own more polite means of and attempts at law enforcement.

I may add that I am troubled, too, at the disposition made of the procedural point presented by the absence of timely motion for the suppression of the exhibits here. Perhaps it should always be overlooked, but certainly much has been made of it in our own and other cases. Thus, see United States v. Salli, 2 Cir., 115
70 F. 2d 292, followed in Rose v. United States, 9 Cir., 149 F. 2d 755; 8 Wigmore on Evidence, 3d ed. 1940, Sec. 2184, p. 31. If ever applicable, it would seem so here, where the defense was known and available to defendant from the beginning and its use might at once have stopped all proceedings, including, of course, the much later jury trial. I had supposed it well settled that when a trial judge made a decision without stating his rationalizations, that decision was to be affirmed on any legal ground which existed. Here, after a brief colloquy from counsel, the judge merely said: "I will receive them." Had Rule 41 (e) Fed. Rules Cr. Proc., been then in effect. I think we must surely have affirmed, for that makes the motion before trial the normal thing, unless the judge rules otherwise.

In United States Circuit Court of Appeals, Second Circuit

UNITED STATES, PLAINTIFF-APPELLEE

v.

MICHAEL DI RE, DEFENDANT-APPELLANT

Appeal from the District Court of the United States for the Western District of New York

Judgment

Filed Feb. 3, 1947

This cause came on to be heard on the transcript of record from the District Court of the United States for the Western District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

ALEXANDER M. BELL, *Clerk.*

[File endorsement omitted.]

71 In the United States Circuit Court of Appeals for the Second Circuit

[Title omitted.]

Motion for leave to file petition for rehearing out of time

Filed March 14, 1947

Comes now the United States, by its attorneys, Theron L. Caudle, Assistant Attorney General, George L. Grobe, United States Attorney, and Michael J. McMorrow, Assistant United States Attorney, and moves the Court for leave to file out of time a petition for rehearing of the Court's decision in this case, rendered February 3, 1947. The decision did not come to the attention of the Department in Washington in time to permit thorough consideration of further steps to be taken in the case, including the advisability of filing a petition for rehearing, within the period allowed by the rules of this Court for such a petition. The Department's study of the record, briefs, and decision indicates that the question of the validity of the search of appellant was deemed to turn on the validity of his arrest, and there was not presented to the Court—and consequently the Court did not consider—the question whether the search was a valid one under the doctrine of Carroll v. United States, 267 U. S. 132, on the theory that the officers had probable cause to believe that the car or its occupants were carrying contraband, i. e., counterfeit gasoline ration coupons. Under this doctrine, the right of search does not depend upon the right to make a prior arrest. The Government desires to develop this proposition in a petition for rehearing.

It is respectfully requested, therefore, that this Court grant the Government leave to file a petition for rehearing. Since such petition will be prepared and printed in Washington, it is requested that the time for filing it be extended to and including March 17, 1947.

Respectfully submitted.

THERON L. CAUDLE,
Assistant Attorney General.
GEORGE L. GROBE,
United States Attorney.
MICHAEL J. MCMORROW,
Assistant United States Attorney.

72 [File endorsement omitted.]

In United States Circuit Court of Appeals for the Second Circuit

UNITED STATES, APPELLEE

v.

MICHAEL DIRE, APPELLANT

Before L. HAND, SWAN, and CLARK, Circuit Judges

Theron L. Caudle, for the petitioner.

On petition for rehearing

PER CURIAM: Conceding for argument that the excuse for the delay is sufficient, upon the merits we hold that the doctrine of Carroll v. United States, 267 U. S. 132, did not justify the arrest of DiRe.

L. H.
T. W. S.
C. E. C. but reserving, however, the grounds I took previously.

Dated March 14, 1947.
Filed March 14, 1947.
[File endorsement omitted.]

In United States Circuit Court of Appeals, Second Circuit

UNITED STATES, PLAINTIFF-APPELLEE

v.

MICHAEL DIRE, DEFENDANT-APPELLANT

Order

Filed March 14, 1947

A motion having been made herein by counsel for appellee to file a petition for rehearing out of time, on the question of the validity of the arrest,

73 Upon consideration thereof, it is

Ordered that the doctrine of Carroll v. United States, 267 U. S. 132 did not justify the arrest of DiRe.

ALEXANDER M. BELL, *Clerk.*

[File endorsement omitted.]
[Clerk's certificate to foregoing transcript omitted in printing.]

Supreme Court of the United States

No. —, October Term, 1946

UNITED STATES OF AMERICA, PETITIONER

vs.

MICHAEL DIRE

Order extending time

Upon consideration of the application of counsel for the petitioner,

It is ordered that the time for filing petition for certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 4th, 1947.

ROBERT H. JACKSON,
Associate Justice of the Supreme Court of the United States.

Dated this 5th day of March 1947.

74 Supreme Court of the United States

Order allowing certiorari

Filed May 19, 1947

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Douglas took no part in the consideration or decision of this application.

U. S. GOVERNMENT PRINTING OFFICE: 1947

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Supreme Court, U. S.
FILED
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CHARLES ELMORE CROPLEY
CLERK

No. 1193, 61

In the Supreme Court of the United States

OCTOBER TERM, 1946

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL DIRE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT